GAN KUI LAN *a*

v.

CHIA KAR LOONG (NO 1)

HIGH COURT MALAYA, KUALA LUMPUR *b*
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S5-22-279-2002]
1 JULY 2002

CIVIL PROCEDURE: *Injunction - Interlocutory injunction - Application for - Whether there was a prima facie cause of action - Whether claim frivolous or vexatious - Whether there were serious questions to be tried* *c*

This was the plaintiff's application for an interlocutory injunction against the defendant in order to preserve the plaintiff's assets and to prevent the disposal or pledging of the same or any of them until the determination of the present suit. The plaintiff had earlier commenced a civil suit ('the S2 suit') against the defendant suing for the return of the plaintiff's assets and for various other reliefs. Subsequently, the plaintiff averred that both of them had reached an oral agreement in which both parties agreed and accepted that the agreement and the performance thereof would be in accord and satisfaction, and would discharge the plaintiff's claim and the defendant's counterclaim in the S2 suit. The plaintiff performed her obligations under the agreement while the defendant refused to keep to his part of the bargain; hence, the plaintiff alleged that the defendant had breached the terms of the agreement. *d* *e*

The defendant contended that the consent order in the S2 suit could only be set aside in another suit, and since there was no prayer in the present suit to set it aside, the present suit was said to be an abuse of the process of the court and should be struck out under O. 18 r. 19 of the Rules of the High Court 1980. The plaintiff however argued that the oral agreement constituted a fresh contract between the parties which in turn gave rise to a new cause of action, and there was thus no necessity to set aside the consent order that was entered in relation to the S2 suit. *f* *g*

Held:

[1] The plaintiff had succeeded in showing to the court that she had a *prima facie* cause of action and that grave injustice would be caused to her if she were denied the interlocutory injunction as her assets would be dissipated. Having shown a valid cause of action, there was no necessity for the plaintiff to show that she would definitely succeed in that cause of action. She only had to show that there was indeed a serious question *h* *i*

to be tried and in this context this court was satisfied that the plaintiff's claim was not frivolous or vexatious. It was certainly a question of fact whether there was indeed an accord and satisfaction in the present case and the right forum to determine this would be at the trial proper. Furthermore, the plaintiff alleged that fraud was perpetrated by the defendant, and the question of whether the representation was false and actually fraudulent, was a question of fact. (pp 173 h-i & 174 a-f)

[Injunction granted.]

Case(s) referred to:

Ackroyd v. Smithies [1885] 54 LT 130 ***(refd)***
Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 ***(refd)***
Atherton v. Heard [1844] 3 LTOS 76 ***(refd)***
Barclay v. Bank of New South Wales [1880] 5 App Cas 374 ***(refd)***
Bell v. Lever Bros Ltd [1932] AC 161 ***(refd)***
Benning v. Dove [1833] 5 C & P 427 ***(refd)***
Bidder v. Bridges [1888] 37 Ch D 406 ***(refd)***
Blakes's Case [1869] 6 Rep 43b ***(refd)***
Bob Guinness Ltd v. Salmonsen Ltd [1948] 2 KB 42 ***(refd)***
Boothbey v. Sowden [1812] 2 Camp 175 ***(refd)***
British Russian Gazette and Trade Outlook Ltd v. Associated Newspapers Ltd [1933] 2 KB 616 ***(refd)***
Central London Property Trust Ltd v. High Trees House Ltd [1947] 1 KB 130 ***(refd)***
Cook v. Lister [1863] 13 CBNS 543 ***(refd)***
Cumber v. Wane [1721] 1 Smith's Leading Cases, 13th edn, p 373 ***(refd)***
Cutts v. Taltal Rly Co Ltd [1918] 62 Sol Jo 423 ***(refd)***
D & C Builders Ltd v. Rees [1966] 2 QB 617 ***(refd)***
Day v. McLea [1889] 22 QBD 610 ***(refd)***
Derry v. Peek [1889] 14 App Cas 337 ***(refd)***
Down v. Hatcher [1839] 10 Ad & E 121 ***(refd)***
Dutton v. Staples [1730] 1 Barn KB 337 ***(refd)***
Edwards v. Hancher [1876] 1 CPD 111 ***(refd)***
Fitch v. Sutton [1804] 5 East 230 ***(refd)***
Foakes v. Beer [1885] 9 App Cas 605 ***(refd)***
Goring v. Goring [1602] Yelv II ***(refd)***
Griffiths v. Earl of Dudley [1882] 9 QBD 357 ***(refd)***
Gwyther v. Boslymon Quarries Ltd [1950] 2 KB 59 ***(refd)***
Hj Mohamed Suboh v. Devadas [1981] 1 MLJ 136 ***(refd)***
Hall v. Flockton [1849] 14 QB 380 ***(refd)***
Hall v. Smallwood [1795] Peake Add Cas 13 ***(refd)***
Henderson v. Stobart [1850] 5 Ex 99 ***(refd)***
Hirschfeld v. London, Brighton and South Coast Railway Co [1876] 2 QBD 1 ***(refd)***
Hookham v. Mayle [1906] 22 TLR 241 ***(refd)***
Hornal v. Neuberger Products Ltd [1957] 1 QB 247 ***(refd)***
Jones v. Broadhurst [1850] 9 CB 173 ***(refd)***

Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors [1995] 1 CLJ 293 ***(foll)***
Khoo Chin Inn & Anor v. Reliance Enterprise Sdn Bhd & Ors [1976] 1 MLJ 35 ***(refd)***
Lewis v. Jones [1825] 4 B & C 506 ***(refd)***
Ludgater v. Love [1881] 44 LT 694 ***(foll)***
Lyne v. Bruce [1794] 2 HBI 317 ***(refd)***
Magee v. Pennine Insurance Co Ltd [1969] 2 QB 507 ***(refd)***
McManus v. Bark [1870] LR 5 Exch 65 ***(refd)***
Midland Railway v. Taylor [1862] 8 HLC 751 ***(refd)***
Nathan v. Ogdens Ltd [1905] 94 LT 126 ***(refd)***
Neuchatel Ashpalte Co Ltd v. Barnett [1957] 1 All ER 362 ***(refd)***
Nicholson v. Revill [1836] 4 Ad & E 675 ***(refd)***
North v. Wakefield [1849] 13 QB 536 ***(refd)***
Overton v. Banister [1844] 8 Jur 906 ***(refd)***
Piercy v. Fynney [1871] LR 12 Eq 69 ***(refd)***
Pinnel's Case [1602] 5 Co Rep 117a ***(refd)***
Powell v. Brodhurst [1901] 2 Ch 160 ***(refd)***
Re EWA [1901] 2 KB 642 ***(refd)***
Re Yeap Chee Fun; ex p Pernas Trading Sdn Bhd [2000] 5 CLJ 280 ***(refd)***
Read v. Great Eastern Railway [1868] LR 3 QB 555 ***(refd)***
Richards v. Bartlets [1584] 1 Leon 19 ***(refd)***
Sambu (M) Sdn Bhd v. Stone World Sdn Bhd & Anor [1996] 2 CLJ 523 ***(refd)***
Sarkawi Sadijo (t/a Jojo's Musical and Promotion House) v. BMG Music (M) Sdn Bhd & Ors [1996] 4 MLJ 515 ***(foll)***
Sathivel Alagarsamy v. Lakshmi Vellasamy [1998] 3 CLJ Supp 343 ***(refd)***
Selangor United Rubber Estates Ltd v. Cradock (A Bankrupt) (No 3) [1968] 1 WLR 1555 ***(refd)***
Sibree v. Tripp [1846] 15 M & W 23 ***(refd)***
Smith v. Chadwick [1884] 9 App Cas 187 ***(refd)***
Smith v. Hughes [1871] LR 6 QB 597 ***(refd)***
Solle v. Butcher [1950] 1 KB 671 ***(refd)***
Solly v. Forbes [1820] 2 B & B 38 ***(refd)***
Steeds v. Steeds [1889] 22 QBD 537 ***(refd)***
Steinman v. Magnus [1809] 11 East 390 ***(refd)***
Thomas v. Heathorn [1824] 2 B & C 477 ***(refd)***
Toh Seak Keng v. Lim Huang Cheow & Ors, Toh Seow Ngan & Ors As Interveners; & Another Case [1989] 2 CLJ 511; [1989] 2 CLJ (Rep) 580 ***(refd)***
Turner v. Browne [1846] 3 CB 157 ***(refd)***
Underwood v. Underwood [1894] P 204 ***(refd)***
Vanbergen v. St Edmunds [1933] 2 KB 223 ***(refd)***
Watters v. Smith [1831] 2 B & Ad 889 ***(refd)***
Wild v. Tucker [1914] 3 KB 36 ***(refd)***
Wood v. Roberts [1818] 2 Stark 417 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19, O. 32 r. 13(1)
Rules of the Supreme Court 1957, O. 26 r. 1, O. 38 r. 20

Other source(s) referred to:
The Digest, on the Annotated British, Commonwealth and European Cases, 12(1), 1991 2nd reissue, p 319, para 2631 & p 320 para 2637

For the plaintiff - S Sidhu (Kam Chin Khoon); M/s Chin, Kam & Partners
For the defendant - M Manoharan; M/s M Manoharan & Co

Reported by Suresh Nathan

JUDGMENT

Abdul Malik Ishak J:

Introduction

By way of an *ex parte* summons in chambers in encl. 3, the plaintiff sought for the following prayers:

1. That upon the Plaintiff, by its Counsel, undertaking to abide by any Order which this Court may make as to damages, in case this Honourable Court may hereafter be of the opinion that the defendant has suffered, if any, by reason of this Order which the Plaintiff ought to pay;

2. The defendant be restrained and an injunction be granted restraining the defendant until the completion of the full trial or further Order whether acting by himself and/or by his servants or agents or otherwise howsoever from transferring, disposing of, mortgaging, assigning, charging, diminishing in anyway or otherwise howsoever dealing with any of the following assets, namely:

   (a) the piece of land held under GM 57, Lot No. 28112, Tempat and Mukim Kuala Lumpur, State of Wilayah Persekutuan;

   (b) the piece of land held under GM 58, Lot No. 28113, Tempat and Mukim of Kuala Lumpur, State of Wilayah Persekutuan together with a double storey bungalow erected thereon;
   (both lands bearing the address No. 9, Changkat Duta, Taman Duta, Wilayah Persekutuan);

   (c) a four (4) storey shophouse erected on land held under Certificate of Title No 15316 Lot 117, Seksyen 0048, Bandar Kuala Lumpur, Wilayah Persekutuan and bearing the address No. 25, 25A, 25B and 25C, Jalan Pinggir, Off Jalan Ipoh, 51200 Kuala Lumpur; and

   (d) 464, 766 shares of Ringgit Malaysia One (RM1.00) each held under Share Certificates Nos: 4 and 5 in Chia Woh Realty Sdn Bhd (Company No 15546-A).

3. That the defendant do deposit the original issue documents of titles to the properties stated above in paragraphs 2(a), 2(b), 2(c) and the original share certificates stated above in paragraph 2(d) with the Senior Assistant

Registrar of this Honourable Court within seven (7) days from the date of this order for safe keeping until the disposal of this action.

4. That the defendant and/or any third party having notice of this order be at liberty to apply to court to discharge, vary or receive consequential orders to them or any of them giving the plaintiff's solicitors not less than seven (7) days written notice of their intention to do so.

5. That this Honourable Court fix a date for the hearing of the Plaintiff's *inter partes* Summons in Chambers within twenty one (21) days from the date of this order.

6. That the costs of and incidental to this application be paid by the defendant to the plaintiff.

7. Any further or other relief as this Honourable Court deems fit.

In support of encl. 3 was an affidavit of the plaintiff that was affirmed on 20 March 2002 as seen in encl. 3A. A certificate of urgency dated 20 March 2002 that was filed on the same day as seen in encl. 4 prompted me to hear encl. 3 expeditiously on 21 March 2002. The urgency of the matter can never be questioned. Be that as it may, upon hearing encl. 3 which was supported by encl. 3A, I made several orders which in effect meant that I allowed encl. 3 particularly prayers 1, 2(a) to 2(d), 3 and 4. I too ordered that costs be costs in the cause. The date for the *inter partes* hearing was then fixed on 8 April 2002.

Now, on 8 April 2002, the *inter partes* hearing was heard and it focused entirely on encl. 7 which was styled as the "summons in chambers (*inter partes*)" and the prayers which the plaintiff sought therein were in identical terms as that of encl. 3 – word by word. Only encl. 7 was served unto the defendant and this prompted the defendant to raise a preliminary objection. Simply put, the preliminary objection was in this fashion. That the service of encl. 7 onto the defendant without an affidavit in support would render encl. 7 to be dismissed with costs.

The stand of the plaintiff was quite simple. It was this. That encl. 7 was supported by an affidavit in encl. 3A. The plaintiff was also relying on the notice to use the affidavit in encl. 3A dated 22 March 2002 which was filed on the same day as seen in encl. 6. That notice in encl. 6 specifically mentioned that the affidavit in encl. 3A was to be referred to and to be regarded as an affidavit in support of encl. 7 by virtue of O. 32 r. 13(1) of the Rules of the High Court 1980 ("RHC") which states as follows:

(1) Any party:

(b) intending to use in any such proceedings any affidavit filed by him in previous proceedings,

must give notice to every other party of the filing or, as the case may be, of his intention to do so.

In essence, the plaintiff was right by giving that notice in encl. 6 in order to rely on the affidavit in encl. 3A for the purpose of hearing encl. 7 because the session on 21 March 2002 was, in fact, a previous proceeding. In my judgment, a written notice just like the one in encl. 6 would be sufficient to invoke O. 32 r. 13(1) of the RHC in favour of the plaintiff. That written notice was sufficient in law to enable the plaintiff to rely on the affidavit in encl. 3A to support the application for the hearing of encl. 7 (*Khoo Chin Inn & Anor v. Reliance Enterprise Sdn Bhd & Ors* [1976] 1 MLJ 35). In my judgment, as presently worded, encl. 6 entitled the plaintiff to rely on encl. 3A to support her application in encl. 7. The written notice in encl. 6 was worded in this way:

NOTICE OF INTENTION TO USE AFFIDAVIT
(O. 32 r. 13(1) of the Rules of The High Court 1980)

TAKE NOTICE that the above-named Plaintiff intends to use and refer to the Affidavit of Gan Kui Lan @ Gan Kee Lan affirmed on the 20th day of March 2002 (encl. 3A) and filed herein as the supporting affidavit to the Summons in Chambers dated the 22nd day of March 2002 (encl. 7) and filed herein.

Dated this 22nd day of March 2002.

Sgd: (Illegible)
...
Messrs Chin, Kam & Partners
Solicitors for the Plaintiff

To:

Chia Kar Loong
Lot 20B, Jalan 51A/223
46100 Petaling Jaya
Selangor Darul Ehsan

This Notice of Intention to Use Affidavit has been filed by Tetuan Chin, Kam & Partners, Solicitors for the Plaintiff and having its correspondence address at No. 51-1, Jalan 3/93, Taman Miharja, Cheras, 55200 Kuala Lumpur.
Tel:03-92856525.
Fax: 03-92856292

(Ref. No.: CKP/1360/2002/L)

No particular form was required to be followed in drafting that written notice in encl. 6. In *Khoo Chin Inn & Anor v. Reliance Enterprise Sdn Bhd & Ors (supra)*, the second and third defendants applied for an order that the plaintiffs'

purported discontinuance of their action against the defendants by notice of discontinuance without leave of the court was in breach of O. 26 r. 1 of the Rules of the Supreme Court. The court ruled that the plaintiffs' discontinuance of their action was not in breach of that Order. The relevant passages of the judgment of Ajaib Singh J in that case can be seen at p. 35 to p. 36 of the report and there his Lordship said:

> The first plaintiff has filed an affidavit with reference to the summons-in-chambers wherein he has alleged that the application by the second and third defendants is bad on the grounds that it is not supported by a proper affidavit affirmed by either of the applicants, that the affidavit affirmed by Mr. K. Gunaretnam does not disclose that he is duly authorised to make the affidavit on behalf of the applicants and that no notice has been given by the applicants of their intention to use any affidavit as is required under O. 38 r. 20 of the Rules of the Supreme Court.

Continuing at the same page of the same judgment, his Lordship Ajaib Singh J said:

> As to the point raised by the first plaintiff that no notice had been given by the applicants of their intention to use any affidavit as was required under O. 38 r. 20 of the Rules of the Supreme Court Mr. Edgar Joseph submitted that the mere fact of serving Mr. Gunaretnam's affidavit of March 7 together with the summons-in-chambers was sufficient compliance with O. 38 r. 20 of intention to use the affidavit. He submitted that no form is prescribed under O. 38 r. 20 as to the manner in which notice is to be given and the supplying of the affidavit itself to the plaintiffs should be taken as notice of intention to use the affidavit. Alternatively he submitted that by virtue of O. 70 r. 1 of the Rules of the Supreme Court the affidavit should not be rendered void.

Further down the same page of the same judgment, his Lordship Ajaib Singh J said in a serious vein:

> In my view the preliminary points raised by the first plaintiff are somewhat technical and are not of such a nature as to vitiate the proceedings before me. Mr Gunaretnam's supplementary affidavit cured the defect if there was any that he had no authority to make the affidavit of March 7, on behalf of his clients. After all a solicitor acting for his client must be deemed to have a general authority to affirm affidavits in the matter in which his client is concerned and I cannot see how it can be said that Mr. Gunaretnam had no authority to affirm an affidavit on behalf of his clients. On the question of giving notice of intention to use an affidavit O. 38 r. 20 does not prescribe any form of notice but however informal such notice may be I think it ought to be in writing by virtue of O. 66 r. 1 which states that all notices required by the rules shall be in writing unless expressly authorised by the court or judge to be given orally. As is the usual practice a statement at the foot of any application whether by summons or notice of motion intimating that the application is supported by

> (an) affidavit of the applicant or some other person is a sufficient compliance with O. 38 r. 20. In the present application there was no such intimation at the foot of the summons-in-chambers nor was there any written notice to the plaintiffs by the applicants of their intention to use the affidavit of Mr. Gunaretnam dated March 7, 1975 in support of their application. However, in the circumstances of this case non-compliance with O. 38 r. 20 was in my view a mere irregularity which did not render the proceedings void.

It must be borne in mind that in *Khoo Chin Inn & Anor v. Reliance Enterprise Sdn Bhd & Ors (supra)* there was no notice of an intention to use an affidavit under O. 38 r. 20 of the Rules of the Supreme Court, yet his Lordship Ajaib Singh J held that the "usual practice" that "a statement at the foot of any application whether by summons or notice of motion intimating that the application" was "supported by (an) affidavit of the applicant or some other person" constituted "sufficient compliance with O. 38 r. 20" notwithstanding the fact that there was no such intimation at the foot of the summons-in-chambers to use the affidavit of the deponent by the name of K Gunaretnam. His Lordship Ajaib Singh J also held that the non-compliance with O. 38 r. 20 of the Rules of the Supreme Court was a mere irregularity and did not render the proceedings to be void. Here, in the instant case, there was a notice to use the affidavit in encl. 3A and that notice can be seen in encl. 6. Here too the *inter partes* summons-in-chambers in encl. 7 carried the "intimation at the foot of the summons-in-chambers" that the application was supported by the affidavit of the deponent marked as encl. 3A. To be precise, at the foot of encl. 7, the following legend appeared:

> The grounds of this application is more clearly set out in the affidavit of Gan Kui Lan @ Gan Kee Lan affirmed and filed herein on the 20th day of March 2002.

Here, there was compliance with O. 32 r. 13(1) of the RHC and there was no irregularity at all that would vitiate the proceedings in encl. 7.

There is a passage appearing in the judgment of Ajaib Singh J in *Haji Mohamed bin Suboh v. Devadas* [1981] 1 MLJ 136 that merits reproduction. At p. 137 of the report, his Lordship succinctly said:

> To what extent will non-compliance with any rule of procedure affect the proceedings must depend on the kind of rule involved. I can think of four categories of the rules. First the rules which are minor or technical. Non-compliance with such rules will not vitiate the proceedings. For example failure to give notice of intention to use any affidavit under O. 38 r. 20 of the Rules of the Supreme Court may well be considered as a mere irregularity not rendering the proceedings void.

And this passage clearly shows the magnanimous attitude of Ajaib Singh J in that case, which attitude has been adopted on an even wider basis by Abdul Hamid Mohamad J (now JCA) in *Re Yeap Chee Fun; ex p Pernas Trading Sdn Bhd* [2000] 5 CLJ 280 when his Lordship said at p. 284 of the report:

> The rule is not an inflexible one. The court does have a discretion whether to allow or not to allow an affidavit filed in an earlier proceeding in the current proceeding. My practice has been that if the affidavit is to be found in the same file, even in another application, I would usually allow the party to refer to the affidavit. Both parties are aware of the existence of the affidavit and its contents. The opposite party is not prejudiced as, most likely, a reply to that affidavit has already been filed. No inconvenience is caused, as the affidavit is to be found in the same file, may be just a few enclosures earlier.
>
> The consideration might be different if the affidavit is in another action in another file. At the very least it is inconvenient to the court that has to call for the other file. It may also cause inconvenience to the other party. Furthermore, it would not be very difficult for the deponent to file and serve a fresh affidavit in the new proceeding.

It was quite obvious that the preliminary objection that was advanced on behalf of the defendant was without any basis at all. The defendant knew simply by looking at encl. 6 that the affidavit in encl. 3A was meant to support the *inter partes* application in encl. 7. I had no choice but to dismiss the preliminary objection with costs.

Facts Of The Case, The Arguments And The Law

I need to narrate the facts in order to understand the *inter partes* summons-in-chambers in encl. 7 and in the course of which the law will also be alluded to.

The plaintiff is a 75 year old Chinese lady who has been on medication over the last ten years for insomnia and heart related problems and she is said to be very weak physically and mentally. The plaintiff's husband is known as Chia Woh and he is said to be recovering from cancer of the colon. Their marriage produced three siblings. The eldest son is the abovenamed defendant, while the second son is known as Chia Kar Yih and the third child is a girl. The relationship between the mother and the eldest son is strained. In this action, the mother as the plaintiff sued the eldest son as the defendant over certain named properties and shares.

At all material times, the plaintiff was described as the beneficial owners of the following properties and shares:

(a) all that land held under GM 57, Lot 28112, Mukim And Tempat Kuala Lumpur;

(b) all that land held under GM 58, Lot 28113, Mukim And Tempat Kuala Lumpur;

(c) on these two pieces of lands as described in (a) and (b) stood a two storey bungalow house bearing postal address number 9, Changkat Dua, Taman Duta, 50480 Kuala Lumpur;

(d) a four storey shop house bearing postal address numbers 25, 25(A), 25(B), and 25(C), Jalan Pinggir, Off Jalan Ipoh 51200 Kuala Lumpur that was erected on a piece of land held under certificate of title number 15316, Lot 117, seksyen 0048, Bandar Kuala Lumpur; and

(e) 464776 fully paid shares of Ringgit Malaysia one each (RM1.00) in Chia Woh Realty Sdn Bhd held under share certificates numbers 4 and 5.

For convenience, all these properties and shares shall henceforth be collectively referred to as the "plaintiff's assets".

On May 21, 2001, the plaintiff commenced a civil suit in the Kuala Lumpur High Court *vide* Civil Suit No: S2-22-385-2001 against the defendant (hereinafter referred to as the "S2 suit"). In that S2 suit, the plaintiff sued the defendant for, *inter alia*, the return of the plaintiff's assets and for various other reliefs. On 12 July 2001 the defendant filed his amended defence and counterclaim to the S2 suit. The defendant counterclaimed in the S2 suit against the plaintiff and against Chia Woh (the plaintiff's husband and the father of the defendant), and against Chia Kar Yih (the plaintiff's youngest son who is also the defendant's younger brother) and against Universal Management Services Sdn Bhd ("UMSSB"). For convenience, Chia Woh, Chia Kar Yih and UMSSB will henceforth be collectively referred to as the "new defendants". In the S2 suit, the defendant counterclaimed, *inter alia*, that the plaintiff voluntarily transferred the plaintiff's assets and the defendant further made allegations of conspiracy between the plaintiff and the new defendants to deprive him of the plaintiff's assets. On 1 June 2001, in relation to the S2 suit, the plaintiff obtained an *ex parte* injunction to restrain the defendant from dealing with the plaintiff's assets pending disposal of the S2 suit for a period of 21 days. On 14 June 2001, the plaintiff obtained in the S2 suit an *inter partes* injunction on the same terms by consent of the defendant. On July 23, 2001, the defendant applied and obtained an *ex parte* injunction against the plaintiff, the plaintiff's husband (Chia Woh), and the plaintiff's youngest son (Chia Kar Yih) in the S2 suit restraining them from dealing with several other assets which were unrelated to the plaintiff's assets for a period of 21 days. The defendant's *inter partes* application for an injunction for the same reliefs in the S2 suit have yet to be heard and determined by the S2 court. Between 15 November 2001 and 10 December 2001 or thereabouts, the plaintiff averred that by an oral agreement between the plaintiff and the defendant, it was agreed that:

(i) the defendant would re-transfer the plaintiff's assets and bear all costs incurred thereby and incidental thereto;

(ii) the defendant would withdraw the counterclaim in the S2 suit against the plaintiff, the plaintiff's husband, the plaintiff's youngest son and UMSSB;

(iii) the plaintiff would withdraw the S2 suit against the defendant; and

(iv) the defendant would engage a new solicitor to represent the plaintiff and reimburse the plaintiff for any and all legal charges incurred thereby.

For convenience, the terms as alluded to above shall be referred collectively as the "agreement". The parties agreed and accepted that the agreement and the performance thereof of the said agreement would be in accord and satisfaction and would discharge the plaintiff's claim in the S2 suit and the defendant's counterclaim in the S2 suit. This seemed to be the tenor of the plaintiff's case. In furtherance thereto, the defendant appointed Messrs Ong Chin Beng & Rakan-Rakan ("the new solicitors") to represent the plaintiff in the S2 suit. The new solicitors later caused the S2 suit to be withdrawn and discontinued against the defendant. The plaintiff had kept to her part of the bargain. The defendant – the eldest son, however refused to keep to his part of the bargain. The defendant was said to be in breach of the agreement and he was said to have miserably failed and/or neglected to do the following:

(a) to re-transfer the plaintiff's assets to the plaintiff and bear all costs incurred thereby and incidental thereto;

(b) to withdraw the S2 counterclaim against the plaintiff's husband, the plaintiff's youngest son and UMSSB; and

(c) to reimburse the plaintiff for the legal charges paid by the plaintiff to the new solicitors.

It was the stand of the plaintiff that upon her performing her obligations under the agreement, it would be inequitable for the defendant not to perform his obligations as set out in the agreement.

I will pause here for a while. I must revert to the agreement which was said to be in accord and satisfaction and which was said to discharge the plaintiff's claim in the S2 suit and the defendant's counterclaim in the S2 suit. According to Scrutton LJ in *British Russian Gazette and Trade Outlook Ltd v. Associated Newspapers Ltd* [1933] 2 KB 616, 643, 644:

> Accord and satisfaction is the purchase of a release from an obligation whether arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative.

That aptly describes a defence of accord and satisfaction. There must be something that is given or done by the defendant to or for the plaintiff which the plaintiff accepts upon a mutual agreement with the defendant that it shall be a discharge of the cause of action. There is no necessity, at all, that the consideration should be executed; the consideration on each side might even be in the category of an executory promise. What is of importance is that the two mutual promises making the agreement must be enforceable in law (*British Russian Gazette and Trade Outlook Ltd v. Associated Newspapers Ltd (supra)*). According to the case of *Gwyther v. Boslymon Quarries Ltd* [1950] 2 KB 59, the defence of accord and satisfaction must necessarily involve some modification of the original bargain. It is purely a question of fact whether there is in existence an accord and satisfaction. Indeed, according to Bowen LJ in *Day v. McLea* [1889] 22 QBD 610, 613 that it is totally dependent on the facts of each case and his Lordship aptly puts it in this way:

> It seems to me, as a matter of principle as well as authority, that the question whether there is an accord and satisfaction must be one of fact.

This very principle found favour and was vigorously applied in the case of *Neuchatel Asphalte Co v. Barnett* [1957] 1 WLR 356. Reference to the following cases should also be made:

(i) *Benning v. Dove* [1833] 5 C & P 427;

(ii) *Barclay v. Bank of New South Wales* [1880] 5 App Cas 374; and

(iii) *Cutts v. Taltal Rly Co Ltd* [1918] 62 Sol Jo 423.

The defence of accord and satisfaction have come of age. It is applicable in a variety of situations. Thus, it would be applicable in the following contexts:

(1) by the delivery of goods;

(2) by the amount of work done;

(3) by way of a substituted agreement;

(4) by the substitution of a third person as a debtor;

(5) by payment of a smaller sum by the third party;

(6) by giving a bill of exchange accepted by a third party;

(7) by indorsing a promissory note made by a third person; and

(8) by acceptance of a smaller sum which would preclude the plaintiff from claiming the balance.

It must be borne in mind that almost anything may be given and received by way of accord and satisfaction. If a debtor pays his creditor a debt *post diem*, the defence of accord and satisfaction would arise. But in the case of an ascertained debt, the payment of a smaller sum by the debtor whether in cash or by way of a cheque or by way of other negotiable bill or note, cannot be said to be a satisfaction of a larger sum then due from him without some additional consideration (*D & C Builders Ltd v. Rees* [1966] 2 QB 617 (CA)). However, payment at an earlier point of time or at a different place may be considered to be good consideration (*Vanbergen v. St Edmunds* [1933] 2 KB 223). Generally speaking, the value of the things done or given in accord and satisfaction will not be inquired into because they are accepted as equivalent by way of an agreement (see *Bidder v. Bridges* [1888] 37 Ch D 406 which distinguishes the case of *Foakes v. Beer* [1885] 9 App Cas 605). Thus, the payment of a smaller sum may be a satisfaction of a larger ascertained debt especially where there is a new consideration to support the agreement to that effect; and a classic example would be the case of *Sibree v. Tripp* [1846] 15 M & W 23 where payment was made by way of three negotiable instruments in substitution for the debt sued for; and another classic example would be when payment is made before the whole debt is payable or by way of a composition under an agreement with the creditors (*Lewis v. Jones* [1825] 4 B & C 506 at 513; *Edwards v. Hancher* [1876] 1 CPD 111; and *Wild v. Tucker* [1914] 3 KB 36). But what is of importance is this. That satisfaction must be true and real, and not a mere mockery. It would be a mockery where payment is made to creditors dependent upon a corresponding payment out of the creditors' account (*Selangor United Rubber Estates Ltd v. Cradock (a bankrupt) (No 3)* [1968] 1 WLR 1555). Accord and satisfaction would also be in existence where the creditor voluntarily agrees to accept a lesser sum in satisfaction of the debt and the debtor acts upon that accord by paying the lesser sum and the creditor duly accepts such payment and it is said that in such a case it would be inequitable for the creditor to insist on the balance (*D & C Builders Ltd v. Rees (supra)* per Lord Denning MR at p. 625 where his Lordship generously applied the case of *Central London Property Trust Ltd v. High Trees House Ltd* [1947] 1 KB 130, and the case of *Bob Guinness Ltd v. Salmonsen Ltd* [1948] 2 KB 42 at 47).

Of pertinence would be this. According to the case of *Hall v. Flockton* [1849] 14 QB 380 and the case of *British Russian Gazette and Trade Outlook Ltd v. Associated Newspapers Ltd (supra)* a substituted agreement may be accepted in accord and satisfaction of an existing cause of action – confining itself to the new promise only and not to the performance of that promise which would be taken into account in satisfaction and discharge thereof. It is said that the discharge of the original debt by the acceptance of the new promise in satisfaction of it is a sufficient consideration for such new promise, and that

if the new promise so accepted is not performed then the remedy of the promisee lies in an action for breach of the new agreement (*Lyne v. Bruce* [1794] 2 HBI 317; and *Henderson v. Stobart* [1850] 5 Ex 99). However, according to the case of *Hookham v. Mayle* [1906] 22 TLR 241, an agreement to accept payment of an existing debt by instalments is *nudum pactum*. In this direction, reference should also be made to the case of *McManus v. Bark* [1870] LR5 Ex 65. Incidentally, accord and satisfaction after a particular breach is said to be a good defence to an action on any contract, whether made by parol or by specialty (*Blakes*'s *Case* [1869] 6 Rep 43b; and *Cumber v. Wane* [1721] 1 Smith's Leading Cases, 13th edn, p. 373). It is trite law to say that accord and satisfaction constitutes a good plea for a specialty debt (*Powell v. Brodhurst* [1901] 2 Ch 160 and *Steeds v. Steeds* [1889] 22 QBD 537). Accord and satisfaction may even be a good defence to a claim for damages (*Read v. Great Eastern Railway* [1868] LR 3 QB 555 and *Griffiths v. Earl of Dudley* [1882] 9 QBD 357).

I will now refer to *The Digest, on the Annotated British, Commonwealth and European Cases*, 12(1), 1991 2nd reissue, in particular to p. 319 at para. 2631 which carries the following write up:

> **Discontinuance of action** Plaintiff had sued in the Prerogative Court of Canterbury to disprove a will, and, if he had proceeded, might have disproved the will and so defeated defendant of pretended legacies. Defendant in consideration that plaintiff, *ultra non procedent* promised plaintiff 100 pounds, and plaintiff declared that he had surceased his said suit. Defendant objected that there was no consideration, for plaintiff might begin his suit again, and plaintiff should have shown a release or discharge of it: Held plaintiff was entitled to judgment. *Rivett & Rivett*'s *Case* [1588] 1 Leon 118; 74 ER 109.

And at p. 320, at para. 2637, the following write up appears:

> **Discontinuance of proceedings in bankruptcy** A debtor who had signed an admission of his debt under 12 and 13 Vict *c* 196, *s* 84, agreed to pay the costs by a certain day in consideration that the creditor would not take further proceedings in bankruptcy against him. The consideration was also expressed to be that the creditor should conduct proceedings so as to avoid as far as possible injuring the debtor's credit: Held an action for breach of contract was good upon the first consideration, but bad upon the second. *Bracewell v. Williams* [1866] LR 2 CP 196; 15 LT 215; 12 Jur NS 1004; 15 WR 130.

I must proceed further and I have this to say. That an accord and satisfaction made by a third party with the plaintiff and on the defendant's behalf may be subsequently adopted by him and enure to his benefit (*Jones v. Broadhurst* [1850] 9 CB 173, 193). And that an accord and satisfaction accepted by one of several persons liable, or jointly and severally liable, for the same debt in question is said to be a discharge of all of the debt (*North v. Wakefield* [1849] 13 QB 536; and *Nicholson v. Revill* [1836] 4 Ad & E 675), and that this

principle of law equally applies to a judgment debt in as much as it applies to any other obligation (*Re EWA* [1901] 2 KB 642) – unless, of course, that there had been an express agreement that the rights of the plaintiff against the other parties liable should be reserved (*Solly v. Forbes* [1820] 2 B & B 38 and *Watters v. Smith* [1831] 2 B & Ad 889). I might as well state that an accord and satisfaction made with one member of a partnership firm which was a fraud on the others and where the facts were known entirely to the debtor, is considered not to be binding on the other joint-creditors in so far as their shares of the debt are concerned (*Steeds v. Steeds* [1889] 22 QBD 537; *Powell v. Brodhurst* [1901] 2 Ch 160; *Piercy v. Fynney* [1871] LR 12 Eq 69; and *Midland Railway v. Taylor* [1862] 8 HLC 751).

As I said, it is purely a question of fact and not of law in order to determine whether an accord has been arrived at. For instance, it is a question of fact whether a cheque is taken in satisfaction of a debt or merely accepted as a payment on account of leaving a balance due. In *Ackroyd v. Smithies* [1885] 54 LT 130 where the cheque was sent "to balance account", retained "on account" and cashed subsequently, the court held that there was no satisfaction. In *Day v. McLea* [1889] 22 QBD 610, CA, the court was confronted with a cheque that was sent in satisfaction and retained "on account" but the court held that there was no satisfaction. In *Nathan v. Ogdens Ltd* [1905] 94 LT 126, CA where there was a cheque payable to order, and at the back of the cheque the following words appeared: "received from – this cheque for pound – being my share of the second and final distribution", but the recipient of the cheque simply ignored those words and the court held that there was no satisfaction. In *Neuchatel Ashpalte Co Ltd v. Barnett* [1957] 1 All ER 362, [1957] 1 WLR 356, CA, the court held that there was no satisfaction in relation to the cheque that was indorsed with the words "in full and final settlement of account." The court must certainly look at the facts of the case and decide accordingly whether there is accord. A valid oral accord or accord in writing of a contract under seal would be recognised by the court (*Steeds v. Steeds (supra)*). However, there can be no satisfaction unless the accord is supported by consideration or is under seal. I must now state the general rule. It is this. That payment or promise of payment of part of a debt does not amount to satisfaction in relation to the rest of the debt (*Pinnel*'s *Case* [1602] 5 Co Rep 117a; *Richards v. Bartlets* [1584] 1 Leon 19; *Goring v. Goring* [1602] Yelv. II; *Cumber v. Wane* [1721] 1 Stra 426; *Dutton v. Staples* [1730] 1 Barn KB 337; *Fitch v. Sutton* [1804] 5 East 230; *Thomas v. Heathorn* [1824] 2 B & C 477; *Down v. Hatcher* [1839] 10 Ad & E 121; *Overton v. Banister* [1844] 8 Jur 906; *Foakes v. Beer* [1884] 9 App Cas 605; *Underwood v. Underwood* [1894] P 204; and *D and C Builders Ltd v. Rees (supra)*). Likewise, a bare agreement by a creditor to accept payment of a debt by way of an instalment is not binding upon the creditor (*McManus v. Bark* [1870] LR 5 Exch 65; *Hookham v. Mayle* [1906] 22 TLR 241; and *Foakes v. Beer (supra)*).

Accord and satisfaction would be ineffective in the following situations:

(1) Where the original cause of action is not discharged where the accord and satisfaction was effected by way of a fraud (*Hall v. Smallwood* [1795] Peake Add Cas 13; *Hirschfeld v. London, Brighton and South Coast Railway Co* [1876] 2 QBD 1; and *Atherton v. Heard* [1844] 3 LTOS 76).

(2) Where the satisfaction has been rendered nugatory by the debtor's act or default as evidenced in the case of *Turner v. Browne* [1846] 3 CB 157.

(3) Where the accord and satisfaction may be rendered void for mistake (*Bell v. Lever Bros Ltd* [1932] AC 161; *Solle v. Butcher* [1950] 1 KB 671; *Magee v. Pennine Insurance Co Ltd* [1969] 2 QB 507, [1969] 2 All ER 891, CA, and *Smith v. Hughes* [1871] LR 6 QB 597).

(4) Where it would be liable to be set aside in equity (*Steinman v. Magnus* [1809] 11 East 390; *Wood v. Roberts* [1818] 2 Stark 417; *Cook v. Lister* [1863] 13 CBNS 543; and *Boothbey v. Sowden* [1812] 2 Camp 175).

So much for the law. I will now revert back to the salient facts of the case.

The stand of the plaintiff was quite plain. It was that the defendant was in breach of the terms of the agreement. It was also averred that the defendant made false representations and had no intention of performing his obligations and that the defendant had acted in the way he did in order to induce the plaintiff to withdraw the S2 suit. The plaintiff averred that she had acted to her detriment by relying on the defendant's representations. By reasons of the above mentioned facts, the plaintiff averred that she had suffered loss and damage which was said to be continuing and ongoing.

It was averred that the plaintiff and her husband have suffered and continued to suffer tremendous mental torture and distress because of the acts and conduct of the defendant. The plaintiff was advised to say and she verily believed that she had a good arguable case against the defendant and that this was a suitable case for the grant of an interim injunction in order to preserve the plaintiff's assets and to prevent the disposal or pledging of the same or any of them until the determination of the suit. The plaintiff was also advised to say and she verily believed that damages would not be an adequate remedy because her claim against the defendant pertained to certain immovable properties and shares as alluded to above and categorised as the plaintiff's assets. The plaintiff too gave an undertaking as regards to damages. It was the stand of the plaintiff that the balance of convenience was in her favour and that the injunction ought to be granted.

The defendant, on the other hand, denied all the averments made by the plaintiff in the affidavit in encl. 3A. The defendant averred in the affidavit in encl. 10 that he did not agree to re-transfer the plaintiff's assets back to the plaintiff because according to him those properties were given to him lawfully. The defendant also averred that the plaintiff through the new solicitors had written a letter dated 13 December 2001 wherein the plaintiff had given the authority to the new solicitors to withdraw the plaintiff's case against the defendant on one condition only and that was for the defendant to withdraw the counterclaim against the plaintiff. That letter dated 13 December 2001 was written in the Chinese language as exhibited in exh. "CKL2" of encl. 10 and the translation thereof was also annexed thereto and it was worded in this way:

> Peguam Ong Chin Beng,
>
> Saya dengan ini memberikan kuasa dan mengamanahkan tuan menguruskan perkara-perkara tersebut di bawah dalam kes Mahkamah Tinggi Kuala Lumpur No. S2-22-385-2001:
>
> 1. Memberhentikan perkhidmatan peguam saya Tetuan Ling & Theng Book, 104B, Jalan PJS 11/2, Subang Indah 46000. Pasa masa yang sama meminta peguam tersebut mengemukakan sebarang bil (jika ada) untuk pengiraan kos.
>
> 2. Menarik balik kes terhadap anak saya, Chia Kar Loong dengan syarat beliau menarik balik tuntutan balas terhadap saya.
>
> t.t.
> GAN KUI LAN
> 13.12.2001

It was the stand of the defendant on 17 January 2002 that the defendant's counsel by the name of Mr M Manoharan had appeared in court and that counsel was informed by the plaintiff's new solicitors that the plaintiff wished to withdraw the S2 suit without any condition and whether the defendant was prepared to withdraw his counterclaim. Later, the defendant agreed to withdraw the counterclaim against the plaintiff on the ground that the plaintiff would withdraw her claim against the defendant on 23 January 2002. The draft consent order for the S2 suit was annexed to encl. 10 as exh. "CKL3" and it was worded in this way:

> PERINTAH PERSETUJUAN
>
> TINDAKAN INI yang dipanggil untuk sebutan pada hari ini dalam kehadiran Encik Ong Chin Beng peguam bagi pihak plaintif di dalam tuntutan asal dan Encik M. Manoharan peguam bagi pihak defendan di dalam tuntutan asal dan Encik H.Y. Lee peguam bagi pihak defendan kedua dan ketiga di dalam tuntutan balas dan Encik Sivasankar peguam bagi pihak defendan keempat di dalam tuntutan balas DAN SETELAH MENDENGAR peguam-peguam tersebut

di atas ADALAH SECARA PERSETUJUAN DIPERINTAHKAN bahawa tuntutan plaintif di dalam tuntutan asal terhadap defendan di dalam tuntutan asal adalah dengan ini dibatalkan DAN ADALAH SECARA PERSETUJUAN JUGA DIPERINTAHKAN bahawa tuntutan balas defendan di dalam tuntutan asal terhadap plaintif didalam tuntutan asal adalah dengan ini dibatalkan DAN SELANJUTNYA ADALAH SECARA PERSETUJUAN DIPERINTAHKAN bahawa Perintah Injunksi (*inter parte*) bertarikh 14 haribulan Jun, 2001 adalah dengan ini diketepikan DAN AKHIRNYA ADALAH SECARA PERSETUJUAN DIPERINTAHKAN bahawa tiada perintah untuk kos.

Bertarikh pada 23 haribulan Januari, 2002

Penolong Kanan Pendaftar
Mahkamah Tinggi
Kuala Lumpur

The defendant unabashedly reiterated his vehement denials to all the averments of the plaintiff in encl. 3A. The defendant deposed in encl. 10 that the plaintiff's averments in encl. 3A were not made *bona fide* because the plaintiff was, throughout the whole episode, represented by counsel of her choice. The defendant further deposed that his father and his younger brother were all represented by solicitors at all material times. The defendant deposed that the plaintiff and her solicitors together with his father and his younger brother and their solicitors did not at any time utter nor put any conditions for the withdrawal of the plaintiff's suit in the S2 suit and the withdrawal of the defendant's counterclaim in the S2 suit. The defendant averred and he proceeded to put the blame squarely on the shoulders of his younger brother who was said to be interested in grabbing all the properties, which was described as the plaintiff's assets, to himself. The defendant then averred that the purpose of the plaintiff in withdrawing the S2 suit was motivated by the actions of the plaintiff's solicitors, namely, Messrs Theng Bock and the defendant's younger brother. It was averred that the plaintiff was misguided by her lawyer – Messrs Theng Bock, and her younger son. The recorded statement of the plaintiff dated 8 January 2002 was exhibited as exh. "CKL4" in encl. 10 and it was certainly interesting reading material. I will now reproduce that recorded statement, which was in fact a translation from the Chinese character, and that would certainly shed more light to the whole matter:

08/01/02 Recorded Statement of Madam Gan Kui Lan

Kar Yih, my youngest son introduced Theng Book, his Lawyer, to me sometime in the second quarter of Year 2001.

I do not know Theng Book before Kar Yih introduced him to me. Kar Yih wanted me to meet Theng Book because he was unhappy that I have transferred some of my property to Kar Loong, my eldest son, after I had a quarrel with

him sometime in the second quarter of year 2000. It was also around this time that Kar Yih tried to strangle me after the heated encounter, i.e. the second quarter of year 2000.

Theng Book came to my house in Taman Duta probably at my youngest son's suggestion and consultation with Theng Book after learning that I have transferred some of my property to Kar Loong.

Theng Book asked me not to be naive. Theng Book said that we cannot really be too trustful. Theng Book said that I probably gave my property away whilst under emotional stress.

I told Theng Book that I have no money to pay the lawyer's fees. Theng Book said that I do not be responsible for the lawyer's fees. Theng Book said that people will pay.

I remember that 2 payments were made to Theng Book, namely, RM3,000.00 for the first time when I met him; and, RM5,000.00 when I met him for the second time when he came with 2 other lawyers who refused to disclose their names to me. I believed that on the second occasion, the lawyers interviewed me. During the second meeting, I informed Theng Book that Kar Loong did not cheat or steal my property. Theng Book said that I have to put up a strong case so that I can get back some of the property which I have given Kar Loong. In the circumstances, Theng Book advised me to exaggerate the events and the version to make Kar Loong look bad on the record.

On the third occasion, Kar Yih and Theng Book took me to Theng Book's law office in Kajang to sign some papers. When I arrived at Theng Book's office at Kajang, I met Theng Book and his other lawyers and they have organised a Chinese Commissioner for Oaths to be present. Theng Book's firm had already prepared documents for me to sign before the Commissioner for Oaths. I cannot remember what I have signed but I believe that the documents were meant for the Court.

Later on Theng Book organised for me to be at the police station to make a police report. I cannot remember what was in the police report prepared by Theng Book's firm. I do not know Malay language for me to understand the nature of its content. Theng Book said that I have to lodge a police report for the case against Kar Loong to proceed.

I honestly do not wish to cause any trouble for anyone in my family. I guess I was misguided when I met Theng Book. That is why I ask you Mr. Ong to take over the matter and to resolve my action against Kar Loong in the High Court. Please proceed with my instructions to withdraw my case against Kar Loong and he is to withdraw his case against me.

Theng Book's firm prepared bill is inordinately high. I did not engage additional counsel. I instruct you to contest his bill straight away. Ask Theng Book to collect the lawyers fees from my husband and Kar Yih.

Recorded by Ong Chin Beng at 11.00 am on Tuesday, January 8, 2002.

Sgd. (Illegible)
8/1/2002

The defendant verily believed and he was advised by his solicitors to say that the plaintiff cannot bring the present action because it would create a dangerous precedent. It was averred that the plaintiff was estopped from bringing the present action against the defendant. Again the defendant verily believed and he was advised by his solicitors to state that the plaintiff's present action was fatally flawed because the consent order in the S2 suit was still subsisting and that there was no writ summons to set aside that consent order.

It would be interesting to narrate the brief background to the S2 suit. I will now do so.

Sometime in the early part of 2000, the defendant requested the plaintiff to transfer the four storey shop house, the shares and the plaintiff's shares in Kee Lan Balakong Sdn Bhd (KLBSB) – hereinafter referred to as the "disputed properties", to the defendant for the specific purpose of the defendant's use. The defendant wanted these disputed properties so that he could show to the business world that he was a man of considerable assets and was credit worthy. It was said that the defendant represented and assured the plaintiff that he would re-transfer the disputed properties back to the plaintiff whenever the plaintiff requested him to do so and it was also said that the defendant had assured the plaintiff that in the interim he would not pledge, encumber, assign, transfer, charge, sell or in anyway dispose the disputed properties. It was said that the plaintiff was initially reluctant. Later the plaintiff relented. The defendant's incessant pressure on the plaintiff to transfer the disputed properties was so overbearing that the plaintiff finally agreed to do so on the express representation and assurance of the defendant that he would re-transfer the disputed properties back to the plaintiff when so requested. It was said that the defendant took undue advantage of the plaintiff's weakened mental and physical state and accordingly exercised an undue influence upon the plaintiff which finally culminated in the transfer of the disputed properties to the defendant. It was said that the document of title and the share certificates of the disputed properties were kept in a bundle together with the original land titles of the two pieces of lands wherein the two storey bungalow house bearing postal address number 9, Changkat Dua, Taman Duta, 50480 Kuala Lumpur stood. This Taman Duta house was described by the plaintiff as the family house. It was further said that when the plaintiff handed that bundle of documents to the defendant, the plaintiff did not realise that it contained the original land titles of the two pieces of lands wherein the family house stood and so, it was said that, the plaintiff had inadvertently handed to the

defendant the original land titles to the family house. The Taman Duta house which was the family house was certainly the prized possession of the plaintiff. It was said that the plaintiff had frantically searched for the original land titles to the family house but to no avail. Later, it was said, that the plaintiff's husband informed the plaintiff that the original land titles to the family house were kept in that bundle of documents. It then dawned upon the plaintiff that she had accidentally and unintentionally given the original land titles to the family house to the defendant when she gave him that bundle of documents.

Realising her folly, the plaintiff was said to have called the defendant and demanded for the return of the original land titles to the family house. Repeated demands were made but the defendant refused to respond. It was said that the defendant had told the plaintiff that she had executed the transfer forms of the original land titles to the family house to him and that he was now the registered owner of that Taman Duta house. The plaintiff then demanded the return of the disputed properties including the family house. It was averred that the plaintiff never intended to execute the transfer forms relating to the family house in favour of the defendant. It was said that fraud was perpetrated by the defendant in regard to the transfer of the Taman Duta house. It was for these reasons that the plaintiff instituted the S2 suit.

The plaintiff further deposed as follows:

(a) That subsequent to the institution of the S2 suit, there were many attempts made by the plaintiff, the plaintiff's husband and the defendant to resolve the matter for the sake of the family unity. One of these attempts took place at the office of Messrs Chew Biman & Co., Advocates and Solicitors sometime in the month of November 2001 and it was there that the solicitors had advised the plaintiff's husband that the understanding reached between the parties to settle the S2 suit could not be effected in law and that it was not valid. It was because of this that the parties decided to continue litigating the S2 suit.

(b) That whilst the S2 suit was still pending, the defendant met the plaintiff to discuss about the matter. In that meeting the defendant told the plaintiff that the language that was employed in the cause papers of the S2 suit described him as a person who had stolen properties and that he felt very hurt and distraught by these allegations. The defendant also said that he was embarrassed to show his face in the public and that his business would be affected by these allegations. The defendant then said that because of the police reports that were lodged and which were exhibited in the S2 suit, he would go to jail and for these reasons the defendant accused the plaintiff and his father of not loving him. The defendant also told the plaintiff that he wanted to withdraw the S2 suit.

(c) The plaintiff told the defendant that family members should not fight and that it was the defendant who had refused to return the disputed properties which had led to the institution of the S2 suit. The plaintiff told the defendant that his behaviour was disrespectful to his father as well as to the plaintiff. It was said that the defendant's actions had caused the younger son and his family to move out of the Taman Duta house – the family house.

(d) That the defendant was remorseful and had told the plaintiff that the defendant was prepared to transfer the plaintiff's assets back to the plaintiff at the defendant's own costs and that the defendant would withdraw the S2 counterclaim. The plaintiff was happy at this turn of events because this meant that her second son and his family would move back to the family house and continue looking after the plaintiff and her husband.

(e) That since the defendant had agreed to transfer the plaintiff's assets back to the plaintiff and to withdraw his S2 counterclaim, the plaintiff had agreed to withdraw her suit in the S2 suit.

These were the plain facts of the case.

Mr M Manoharan for the defendant argued that the consent order for the S2 suit added a different complexion to the present suit. He submitted that if the plaintiff was not happy with the consent order that was arrived at in the S2 suit, the plaintiff should file an application to set aside that consent order. Alternatively, he submitted that the plaintiff should file a writ to set aside that consent order in the S2 suit. He further submitted that there was no prayer in encl. 1 of the present suit to set aside the consent order in the S2 suit. He ventured to say that in order to set aside the consent order in the S2 suit, the plaintiff must file a civil suit in the present action asking to set aside the consent order of the S2 suit. This, according to him, was the best way to set aside the consent order of the S2 suit otherwise there would be chaos. He then cited the case of *Sambu (M) Sdn Bhd v. Stone World Sdn Bhd (Formerly Known As Kostone Sdn Bhd) & Anor* [1996] 2 CLJ 523. There in relation to a consent order, I had this to say (see p. 525 to p. 526 of the report):

> Was there deception exerted on this Court tantamount to frustrating the administration of justice when it gave those orders on 15 February 1996?
>
> Rule 17 of the Legal Profession (Practice And Etiquette) Rules 1978 states that: 'An advocate and solicitor shall not practice any deception on the Court.' This is followed by r. 18 which states in strong terms that:
>
> > The conduct of an advocate and solicitor before the Court and in relation to other advocates and solicitors shall be characterised by candour, courtesy and fairness.

I did say in *K.S. Chua & Co. v. Chui Miang Chew & 5 Others* [1995] 3 AMR: 2605 especially at page 2618 that:

> Lawyering is not an easy job. It requires hard work, skill, patience, knowledge of the law and, above all, good health and some measure of luck.

That was said in the context of an O. 25, r. 1 (4) of the RHC where the defendants there sought to dismiss the plaintiffs' claim for want of prosecution. To that I must add that there must also be some measure of integrity and righteousness. Sargant J in *Re Hearn, de Bertodano v. Hearn* [1913] 108 LT 452 at 454 did say that where the parties settle or compromise pending proceedings, whether before, at or during the trial, the settlement or compromise constitutes a new and independent agreement between them made for good consideration. Its effects have been said:

(a) to put an end to the proceedings, for they are thereby spent and exhausted: per Sargant J. in *Re Hearn, de Bertodano v. Hearn (supra)*;

(b) to preclude the parties from taking any further steps in the action (*Green v. Rozen* [1955] 2 All ER 797; [1955] 1 WLR 741), except where they have provided for liberty to apply to enforce the agreed terms (*Dashwood v. Dashwood* [1927] WN 276);

(c) to supersede the original cause of action altogether (*Smythe v. Smythe* [1887] 18 QBD 544 DC).

It is instructive to mention that in *Harvey v. Croydon Union Rural Sanitary Authority* [1884] 26 Ch D 249 CA it was held that where Counsel, by authority of their clients, consent to an order, the consent cannot be arbitrarily withdrawn to prevent the order passing. In *Serrao v. Noel* [1855] 15 QBD 549 CA it was held that a judgment or order made by consent is binding unless and until it has been set aside in proceedings instituted for that purpose and it could be construed as an estoppel by record. It is my judgment that the decision delivered on 15 February 1996 reflected the consent of the first defendant through Mr Rodney Gomez and the consent of the plaintiff through Mr Jagjit Singh to agree to the decision of the Senior Assistant Registrar and for the sum of RM1,225,008.10 to proceed to arbitration. To construe otherwise would go against what had been recorded in the notes of proceedings. It is a sad day for the judiciary to see lawyers coming to Court to deceive and frustrate the administration of justice. Will this sad state of affairs continue *ad infinitum*? Only time will tell.

In *Toh Seak Keng v. Lim Huang Cheow & Ors, Toh Seow Ngan & Ors As Interveners; & Another Case* [1989] 2 CLJ 511; ([1989] 2 CLJ (Rep) 580), a decision of VC George J (as he then was), the headnote merits reproduction (see p. 512 (p. 581) of the report):

Held:

> [1] It is the fact (that) there were previous proceedings to set aside the consent order. On the strength of the rule set out in *Henderson v. Henderson* [1843] 3 Hare 100 and applied in *Yat Hung Investment Co. Ltd. v. Das Heng Bank Ltd.* [1975] AC 581, it is not open to the petitioner to file a fresh action seeking to have the consent order set aside on grounds not pleaded in his earlier action. He should have brought forward his whole case and not having done so he will not be permitted to open the same subject of litigation in matters which could have been brought up for adjudication in the previous proceeding but were not.

Now, reference was also made to the case of *Sathivel Alagarsamy v. Lakshmi Vellasamy* [1998] 3 CLJ Supp 343, where Zaleha Zahari J had this to say in regard to the setting aside of a consent judgment (see p. 353 of the report):

> With regard to the circumstances in which the court should interfere to set aside an order based on a compromise I have been referred to a number of authorities by both sides. I understand the law to be this. A judgment obtained by consent of counsel in court in a matter within counsel's authority cannot form the subject matter of appeal. If with his client's authority and consent counsel agrees to an order and there is no mistake or surprise, the client cannot arbitrarily withdraw his/her consent, but if counsel subsequently informs the court that he agreed under misapprehension the court will not hold him or his client to the agreement. The case of *Marsden v. Marsden* [1972] Fam 280 lays down the principle if counsel agrees contrary to his client's clear instructions the court will not hold the client to the agreement.

Using these authorities as leverages, the learned counsel for the defendant submitted with vigour and vitality that the consent order in the S2 suit can only be set aside in another suit. It was also submitted that since there was no prayer in the present suit to set aside the consent order of the S2 suit, the present suit was said to be an abuse of the process of the court. It was for these reasons that the defendant had since filed an application to strike out the writ in the present suit under O. 18 r. 19 of the RHC.

Mr S Sidhu assisted by Mr Kam Chin Khoon acted for the plaintiff and they implored this court to consider the background that led to the consent order in the S2 suit. It was submitted that the solicitor who represented the plaintiff at that time was appointed by the defendant. It was emphasised that the plaintiff had an existing injunction against the defendant in the S2 suit. The consent order in the S2 suit was nothing more than a withdrawal of the claim and the counterclaim with no order as to costs. It was submitted that the S2 suit was tainted with fraud and misrepresentation. The misrepresentation was said to exist in this fashion: that the defendant wanted the plaintiff's assets to show to the whole world at large, so to speak, that he is a reputable

businessman and that he would hand over the plaintiff's assets to the plaintiff when demanded. Events have shown that the defendant had failed to do so. In regard to the fraud it was said that the Taman Duta house was never meant to be given to the defendant at all. It was said that the land titles to the Taman Duta house were mixed up with the other titles that were given to the defendant. And that instead of returning the land titles to the Taman Duta house, the defendant transferred the said property to himself. It was said that after the S2 suit was filed, the parties agreed to compromise and to cease the S2 suit on certain terms. For fear of repetition, those terms have been alluded to in the early part of this judgment and I do not propose to regurgitate them here again. Suffice for me to say that the plaintiff as the mother to the defendant and on the strength of those terms withdrew the S2 suit. But unfortunately, it turned out that the defendant, as the son, did not honour his side of the bargain. On these facts, it was vigorously argued that the plaintiff had a completely new cause of action against the defendant as reflected in the present suit and that new cause of action may compendiously be described as a breach of the agreement that was reached between the parties and that the agreement was not in writing. It was argued that there was accord and satisfaction when the S2 suit was resolved in that there was a promise by the defendant to withdraw the counterclaim in toto and to re-transfer the plaintiff's assets back to the plaintiff; but, somehow, the defendant had breached that promise and for that reason it was argued that the plaintiff's cause of action in the present suit was for a breach of that promise. It was ingeniously argued that since the present suit was a totally new cause of action there was thus no necessity to set aside the consent order of the S2 suit. It was said that the promise was in the nature of a fresh contract which in turn gave rise to a new cause of action and there was thus no necessity to set aside the consent order that was entered in relation to the S2 suit. The stand of the plaintiff was quite simple. The plaintiff by way of her statement of claim in encl. 1 was seeking to enforce the agreement that was reached with her son – the defendant, and this can clearly be seen in para. 19(a) of the statement of claim in encl. 1 which was worded in this way:

> A declaration that the terms agreed by the parties as set out in paragraph 10 of this statement of claim constitutes a valid and binding agreement between the parties.

In essence, para. 10 of the statement of claim in encl. 1 paraphrased the terms of the oral agreement that was agreed upon between the plaintiff and the defendant which had been alluded to in the early part of this judgment. In the light of all these submissions, it was pointed out that the plaintiff was not revisiting the S2 suit at all. Rather, so the submission went, the plaintiff was merely stating that the oral agreement constituted a fresh agreement between the parties which had substituted the S2 suit. This submission seemed

to strike a familiar chord with the principles of law that were established in *Hall v. Flockton (supra)* and in *British Russian Gazette and Trade Outlook Ltd v. Associated Newspapers Ltd (supra)*. It was further submitted that the breach of the oral agreement by the defendant entitled the plaintiff to sue the defendant accordingly.

An argument was advanced on behalf of the plaintiff that there was an oral settlement and that there was a breach thereof. Because of that, the plaintiff was said to be interested in enforcing that oral settlement. My attention was drawn to a letter dated 13 December 2001 that was written by the plaintiff to her solicitors in the Chinese language and the translation was annexed to encl. 10 and marked as exh. "CKL2" and that letter had since been reproduced *verbatim* in the early part of this judgment. It was this very letter that provoked an adverse reaction by the plaintiff's learned counsel in the person of Mr S Sidhu. He posed this question:

> How did the defendant get hold of this correspondence?

and he continued to say by way of a submission that if the defendant got hold of this letter from the plaintiff's solicitors, it showed that the defendant was masterminding the whole affair. This, he said, was a worrying phenomenon and that it served as a good ground to grant the injunction in favour of the plaintiff. He submitted that the plaintiff was merely seeking for an interim order pending the full trial. He too submitted that the plaintiff was not seeking the remedy now but rather the plaintiff was merely asking this court not to "shut her off" at this juncture. In *Sarkawi bin Sadijo (t/a Jojo's Musical and Promotion House) v. BMG Music (M) Sdn Bhd & Ors* [1996] 4 MLJ 515, I had occasion to say something about an interlocutory injunction. At p. 527 to p. 529 of the report, this was what I had said:

> Heavy reliance was placed on the case of *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah & Ors* [1995] 1 CLJ 293 (CA) where Gopal Sri Ram JCA said at pp 305-306:
>
> > To summarise, a judge hearing an application for an interlocutory injunction should undertake an inquiry along the following lines:
> >
> > (1) he must ask himself whether the totality of the facts presented before him discloses a *bona fide* serious issue to be tried. He must, when considering this question, bear in mind that the pleadings and evidence are incomplete at that stage. Above all, he must refrain from making any determination on the merits of the claim or any defence to it. It is sufficient if he identifies with precision the issues raised on the joinder and decides whether these are serious enough to merit a trial. If he finds, upon a consideration of all the relevant material before him, including submissions of counsel, that no serious question is

disclosed, that is the end of the matter and the relief is refused. On the other hand if he does find that there are serious questions to be tried, he should move on to the next step of his inquiry;

(2) having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. In making his assessment, he must take into account all relevant matters, including the practical realities of the case before him. He must weigh the harm that the injunction would produce by its grant against the harm that would result from its refusal. He is entitled to take into account, *inter alia*, the relative financial standing of the litigants before him. If after weighing all matters, he comes to the conclusion that the plaintiff would suffer greater injustice if relief is withheld, then he would be entitled to grant the injunction especially if he is satisfied that the plaintiff is in a financial position to meet his undertaking in damages. Similarly, if he concludes that the defendant would suffer the greater injustice by the grant of an injunction, he would be entitled to refuse relief. Of course, cases may arise where the injustice to the plaintiff is so manifest that the judge would be entitled to dispense with the usual undertaking as (to) damages (see *Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90). Apart from such cases, the judge is entitled to take into account the plaintiff's ability to meet his undertaking in damages should the suit fail, and, in appropriate cases, may require the plaintiff to secure his undertaking, for example, by providing a bank guarantee; and

(3) the judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the *status quo*, an expression explained by Lord Diplock in *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130; [1983] 2 All ER 770; [1983] 3 WLR 143 and applied in *Cheng Hang Guan*. It is a judicial discretion capable of correction on appeal. Accordingly, the judge would be entitled to take into account all discretionary considerations, such as delay in the making of the application or any adequate alternative remedy that would satisfy the plaintiff's equity, such as an award of monetary compensation in the event he succeeds in establishing his claim at the trial. Any question going to the public interest may, and in appropriate cases should, be taken into account. A judge should briefly set out in his judgment the several factors that weighed in his mind when arriving at his conclusion.

Applying *Keet Gerald Francis Noel John* to the fullest, it is my judgment after considering the totality of the facts presented through the affidavits that the plaintiff here, being the applicant who is asking for an interlocutory injunction, must first and foremost have a cause of action before I will grant him any

remedy. This is especially so when this court is asked to grant an interlocutory remedy without having the benefit of a full trial. I am acutely aware that the plaintiff is saying that in the event the plaintiff is denied the injunction sought by him, he would suffer grave injustice as the first defendant being the alleged tortfeasor would enjoy the benefit of their tort and that the second, third, fourth and fifth defendants would continue breaching the written agreements with impunity. With respect, if the plaintiff cannot show to this court that he has a valid cause of action his application must surely fail (see *RCA Sdn Bhd v. Pekerja-Pekerja RCA Sdn Bhd & Ors* [1991] 1 CLJ 19; [1991] 1 CLJ (Rep) 401; *Associated Newspapers Group v. Insert Media Ltd* [1988] 2 All ER 420). On the other hand, if the plaintiff can show to this court that he has *prima facie* a valid cause of action, he need not go on to show that he will definitely succeed in that cause of action. He needs only to show that there is a serious question to be tried. In my judgment, when Lord Diplock uses the phrase 'a serious question to be tried' in the *American Cyanamid* case, he must have in mind that the court must be satisfied that the claim is not frivolous or vexatious. One must not forget what Rajah J said in *Hong Kong Vegetable Oil Co Ltd v. Malin Sirinaga Wicker & Ors* [1978] 2 MLJ 13 at p 151:

> … implicit in 'a serious question to be tried' is the question whether the action is properly conceived and whether all the proper, necessary and/or interested parties are before the court so that any order made by the court can properly and effectively be implemented.

I venture to say that implicit in the phrase 'a serious question to be tried' the applicant must show that he has a valid cause of action. What is a cause of action? Syed Agil Barakbah SCJ (as he then was) in *Hock Hua Bank Bhd v. Leong Yew Chin* [1987] 1 MLJ 230 (SC) defined it in this way at p 236:

> A cause of action is simply a factual situation the existence of which entitles a plaintiff to obtain from the court a remedy against the defendant.

Salleh Abas LP (as he then was) observed in *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12 (SC) at p 19 that:

> A cause of action' is a statement of facts alleging that a plaintiff's right, either at law or by statute, has, in some way or another, been adversely affected or prejudiced by the act of a defendant in an action. Lord Diplock in *Letang v. Cooper* [1965] 1 QB 232 at p 242 defined 'a cause of action' to mean 'a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person'. In my view, the factual situation spoken of by Lord Diplock must consist of a statement alleging that, first, the respondent/plaintiff has a right either at law or by statute and that, secondly, such right has been affected or prejudicated by the appellant/defendant's act.

In the context of the present case, the factual matrix showed that the plaintiff had disclosed serious issues to be tried. The plaintiff had shown to this court that she had, *prima facie*, a valid cause of action and there was no necessity for her to show that she will definitely succeed in that cause of action. In my judgment, the plaintiff had shown serious questions to be tried. It can rightly be said that the defendant had acted in a manner that went against the interests of his own mother by depriving her of her own properties and shares and promising her to do something which he himself did not do in that he refused to re-transfer those assets back to her – his own mother. As demonstrated, those properties included the Taman Duta house which was in fact the family house where the plaintiff had been staying there with her husband since 1978. The plaintiff was merely seeking an injunction until the full trial of the whole case. The injunction too would serve to restrain the defendant from disposing off those properties and shares.

Mr M Manoharan took exceptions to the submissions of Mr S Sidhu. He said that the plaintiff was harping on the existence of the oral settlement agreement before the consent order was entered in the S2 suit. Yet the existence of the oral settlement agreement was not disclosed to anyone of the parties in the S2 suit. He questioned as to the failure to disclose the existence of the oral settlement agreement in the S2 suit. He submitted that it was shocking that the defendant must also withdraw the entire counterclaim against third parties in the S2 suit. He submitted that the plaintiff's husband and the plaintiff's youngest son were not even aware of such an oral settlement. He submitted that the solicitors representing the plaintiff's husband and the plaintiff's youngest son were still continuing with the proceedings in the S2 suit by way of case managements and other interlocutory applications. Again he questioned the existence of the oral settlement agreement. He submitted that the parties who should know about the existence of the oral settlement agreement had no knowledge about it. He questioned as to the failure to incorporate the terms of the oral settlement agreement in the consent order of the S2 suit. He submitted that the terms of the oral settlement agreement should be incorporated as part and parcel of the consent order in the S2 suit so as to facilitate enforcement. He submitted that the plaintiff was now saying that she wanted to enforce the so called oral settlement agreement because there was a breach of that agreement. He submitted that the plaintiff cannot plead ignorance, mistake or for whatever reason because the plaintiff was, all along, represented by a solicitor. He pointed out that the plaintiff's husband who was on talking terms with the plaintiff was represented by a different solicitor from that of the plaintiff. He submitted that the plaintiff was saying that the defendant had orchestrated the whole episode. He said that this was not possible and he further questioned as to whether the learned counsel acting for the plaintiff could be taken for a ride. He referred to a lawyer by the name of Mr Ong Chin Beng of Messrs Ong Chin Beng & Rakan-Rakan and he said

that Mr Ong Chin Beng is a senior lawyer in the legal profession who has put in 20 years in the legal field. Flowing from this, he said that the allegations by the plaintiff were not only shocking but it showed that lawyers come to court to withdraw a particular case without any specific terms of settlement. He then submitted that this was not the first time that the plaintiff had come to court to do this. He then proceeded to elaborate. He said that the first solicitor whom the plaintiff had engaged was principally to transfer the properties to the defendant. The plaintiff became upset with the first solicitor and lodged a police report against the first solicitor. To protect himself, the first solicitor also lodged a police report. The plaintiff then engaged the second solicitor in order to file the S2 suit, but for reasons best known to her the plaintiff discharged the second solicitor. It appeared that she discharged the second solicitor simply because the latter was said to have misguided her. In its place the plaintiff then engaged the third solicitor, namely, Mr Ong Chin Beng of Messrs Ong Chin Beng & Rakan-Rakan. The plaintiff then instructed her third solicitor to withdraw the S2 suit. The learned counsel for the defendant then proceeded to submit on the following lines:

(1) that solicitors take client's instructions and attend court solely on client's instructions; and

(2) that if there was an oral settlement agreement it would be incorporated as part and parcel of the terms of the consent order for the S2 suit because no solicitor would "hide, ignore, or abandon" the oral settlement agreement for no apparent reason.

He also questioned the integrity of the plaintiff. He enquired whether the plaintiff had come with clean hands. He submitted that the plaintiff was the only person who knew of the existence of the oral settlement agreement. He submitted that the plaintiff had failed to set aside the consent order in the S2 suit in order to introduce the oral settlement agreement. It was submitted that the plaintiff was estopped from raising the same issues that arose in the S2 suit to the facts of the present case. He emphasised that the consent order in the S2 suit was in the nature of a final order. He too emphasised that the prayers that were sought in the S2 suit were the same as the prayers that were sought in the present case. He relied on the case of *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783, a decision of the then Federal Court, and he submitted that if one prayer was the same as the earlier suit, the parties would be estopped from raising a new cause of action. Peh Swee Chin FCJ in *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd (supra)* aptly said at p. 793 to p. 794 of the report the following sage words and what his Lordship had said bears repetition:

> Again *LE Wahwin & Partners Ltd v. West Sussex County Council* [1975] 3 All ER 604, it was held that plaintiff's claim in 1975 to a right to maintain

a barrier on a certain road on ground of an only earlier partial dedication of it, was faced with a judgment in 1958, in which the predecessor in title of the plaintiff had been a party to proceedings before Quarter Sessions over the status of the same road, and in which the said predecessor in title failed to raise the question of the right to maintain such a barrier. It was held that the failure of the said predecessor in title ie, a privy to the present plaintiff, to raise the question estopped the plaintiff from raising the said question and the action failed.

On the other hand, the issue estoppel literally means simply an issue which a party is estopped from raising in a subsequent proceeding. However, the issue estoppel, in a nutshell, from a consideration of case law, means in law a lot more ie, that neither of the same parties or their privies in a subsequent proceeding is entitled to challenge the correctness of the decision of a previous final judgment in which they, or their privies, were parties. This sounds like explaining a truism, but it is the corollary from that statement that is all important and that could have given birth to the controversies alluded to above; the corollary being that neither of such parties will be allowed to adduce evidence or advance any argument to contradict such decision. In this respect, we respectfully agree with Peter Gibson, J in *Lawdor v. Gray* [1984] 3 All ER 345, 350 who said:

> Issue estoppel ... prevents contradiction of a previous determination, whereas cause of action estoppel prevents reassertion of the cause of action.

It is important to bear in mind the manner in which the issue estoppel operates in preventing such contradiction of the previous judgment.

There is one school of thought that issue estoppel applies only to issues actually decided by the court in the previous proceedings and NOT to issues which might have been and which were not brought forward, either deliberately or due to negligence or inadvertence, while another school of thought holds the contrary view that such issues which might have been and which were not brought forward as described, though not actually decided by the court, are still covered by the doctrine of *res judicata* ie, doctrine of *estoppel per rem judicatum*. We are of the opinion that the aforesaid contrary view is to be preferred; it represents for one thing, a correct even though broader approach to the scope of issue estoppel. It is warranted by the weight of authorities to be illustrated later. It is completely in accord or resonant with the rationales behind the doctrine of *res judicata*, in other words, with the doctrine of *estoppel per rem judicatum*. It is particularly important to bear in mind the question of the public policy that there should be finality in litigation in conjunction with the exploding population; the increasing sophistication of the populace with the law and with the expanding resources of the courts being found always one step behind the resulting increase in litigation.

It is further necessary at this stage to understand the import of the words in the said famous statement ie, '... every point which properly belonged to the subject of litigation ...' which Somervell LJ explained in *Greenhalgh v. Mallard* [1947] 2 All ER 255, 257 as follows:

> ... *res judicata* for this purpose is not confined to the issues which the court is actually asked to decide, but ... it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.

This explanation of Somervell LJ was also quoted with approval in the Privy Council in *Yat Tung Investment Co v. Dae Heng Bank & Anor* [1975] AC 581.

It seemed that the plaintiff was saying that she had a fresh cause of action based on the enforcement of an oral settlement agreement. The defendant on the other hand was saying that prior to the consent order in the S2 suit, the oral settlement agreement was already in existence and the defendant relied on the speech of Peh Swee Chin FCJ in *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd (supra)* when his Lordship said that everything must be mounted in a single action and not on a multiplicity of actions. It was submitted that if the plaintiff was allowed to advance the present case it would cause a dangerous precedent in that it was tantamount to allowing the plaintiff to revisit the S2 action. The plaintiff would then make all kinds of allegations against her own son – the present defendant, and this, according to the learned counsel, must be prevented at all costs. It was emphasised that the plaintiff's husband and the plaintiff's youngest son did not affirm any affidavits to verify the existence of the oral settlement agreement which the plaintiff was alluding to at great length.

In regard to the submissions that the defendant had access to the letter marked as exh. "CKL2" of encl. 10 and thereby was masterminding the whole affair, the learned counsel for the defendant pointed out that there was no affidavit in rebuttal of encl. 10 and therefore what was alluded to in encl. 10 together with the exhibits that were annexed thereto must be construed as correct. It must be borne in mind that the plaintiff was merely pointing out as to how the defendant managed to secure possession of the letter marked as exhibit "CKL2" which was annexed to encl. 10 and that the plaintiff was not challenging the contents of encl. 10 *per se*.

The defendant was most unhappy. It was said that the opposing party and all the other siblings were against him right from the very beginning. It was the stand of the defendant that the plaintiff was being used by the youngest son to go against him. The youngest son of the plaintiff who happened to be the younger brother of the defendant was said to have played a prominent role in

manipulating the whole episode. Out of despair the defendant speaking through his learned counsel said:

> How come no one is saying anything about the other brother?

It was submitted that the younger brother and the defendant's father did not affirm affidavits to say that the plaintiff was victimised and was fleeced off her properties and shares and was left in the street, so to speak, by the defendant. It was submitted that the squabbles were between two brothers and yet the plaintiff was dragged into the arena and was forced to file one suit after another in succession. It was pointed out that the plaintiff had every opportunity in the S2 suit to ventilate her rights. And that when the S2 suit was settled, the plaintiff was again dragged into the picture by filing a similar civil suit of the same nature against the defendant. The learned counsel even proceeded to submit as to whether there would be other civil suits after the present case. It was also submitted, in a cynical manner, whether the plaintiff would in future come up with the same story that there was another oral settlement agreement despite her being represented by a solicitor. Finally, it was submitted that before an injunction could be granted there must be a cause of action. Hence, it was submitted that there was no cause of action and for that reason encl. 7 ought to be dismissed with costs.

Mr S Sidhu for the plaintiff responded and in regard to the solicitors that represented the plaintiff, he submitted that the defendant introduced the first solicitor to the plaintiff. The third solicitor too was appointed by the defendant to act for the plaintiff. It must be borne in mind that Mr Ong Chin Beng of Messrs Ong Chin Beng & Rakan-Rakan – the third solicitor, legally took over the conduct of the case for the plaintiff on 24 December 2001 as reflected in exh. "CKL5" at p. 310 of encl. 3A. Flowing from this, Mr S Sidhu queried as to how the defendant obtained the letters marked as exhs. "CKL2" and "CKL4" of encl. 10, which have been reproduced *in extenso* somewhere in this judgment, unless the defendant obtained those letters from the plaintiff's solicitors which would show that the defendant was controlling the plaintiff's solicitors. It was strenuously argued that the present case before this court was mounted on a fresh cause of action as pleaded in the statement of claim and for this reason it was emphasised that the plaintiff was not caught by the issue of estoppel.

After perusing through the available evidence, it was part and parcel of my judgment that there was indeed a cause of action in the present suit for this court to adjudicate upon. The plaintiff had succeeded in showing to this court that she has a *prima facie* valid cause of action. Grave injustice would be caused to the plaintiff if she was denied the interlocutory injunction which she eagerly sought for in encl. 7. The plaintiff's assets would be dissipated if

the interlocutory injunction was not granted by this court in favour of the plaintiff. Having shown a valid cause of action, I reiterate that there was no necessity for the plaintiff to show that she would definitely succeed in that cause of action (*Sarkawi bin Sadijo (t/a Jojo's Musical and Promotion House) v. BMG Music (M) Sdn Bhd & Ors (supra)*) which vigorously applied *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah & Ors* [1995] 1 CLJ 293, CA. The plaintiff had only to show that there was indeed a serious question to be tried and in this context this court was satisfied that the plaintiff's claim was not frivolous or vexatious. It was certainly a question of fact whether there was indeed an accord and satisfaction in the present case. The right forum to determine this would be at the trial proper. In the meantime, the interlocutory injunction must be granted in favour of the plaintiff.

It must be recalled that the plaintiff alleged that fraud was perpetrated by the defendant in regard to the transfer of the Taman Duta house. "Fraud" is an ugly word. And "fraud" is proved, according to Lord Herschell in *Derry v. Peek* [1889] 14 App Cas 337 at 374, HL, when it is shown that a false representation has been made (a) knowingly, or (b) without belief in its truth, or (c) recklessly, careless whether it be true or false. The standard of proof to determine whether a representation alleged to have been fraudulent was so made is the civil standard of balance of probability and not the criminal standard of proof beyond reasonable doubt (*Hornal v. Neuberger Products Ltd* [1957] 1 QB 247, [1956] 3 All ER 970, CA). Of course, the question whether there is any evidence to support the allegation that a particular representation that was made was fraudulent is entirely a question of law (*Smith v. Chadwick* [1884] 9 App Cas 187 at 193, HL). Whereas, the question whether the representation was false and which was actually fraudulent, is basically a plain question of fact (*Ludgater v. Love* [1881] 44 LT 694 at 695, CA).

All things said and done, the interlocutory injunction must be granted in favour of the plaintiff.

Since I have said that the prayers that were sought for in encl. 3 were identical with that of encl. 7, I have no desire to reproduce them. Suffice for me to grant the prayers that were sought for in encl. 7 particularly prayers 2(a), (b), (c), (d), 3, 4 and 5. I too allowed prayer 1 of encl. 7.

In the meantime, I ordered that the plaintiff to file Form 63 with a view to case manage the present suit.